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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

IN RE:

JUDITH LYNN MADRID,

Debtor,

_____/

JUDITH LYNN MADRID,

Petitioner,

v.

LAWYERS TITLE INSURANCE CORP.
and DONALD TURNEY,

Appellees.

_____/

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VERNON E. LEVERTY, ESQ.
VICTOR M. PERRI, ESQ.
MILLER & DAAR
832 Willow Street
Reno, Nevada 89502
(702) 322-6636

86 pp

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE:

JUDITH LYNNE MADRID,

Debtor.

No. 82-4433
BAP #NV 81-1106,
81-00038

JUDITH LYNNE MADRID,

Appellant,

vs.

LAWYERS TITLE INSURANCE CORP., and DONALD TURNEY,

Appellees.

Appeal from the United States Bankruptcy Appellate Panel of the Ninth Circuit
Hughes, Volinn and Elliott, Bankruptcy Judges, Presiding
Argued and submitted February 18, 1983

before: GOODWIN, TANG and FARRIS, Circuit Judges.

TANG, Circuit Judge:

The sole question before us is whether the nonjudicial foreclosure sale

of appellant's home may be set aside under 11 U.S.C. § 548(a) of the Bankruptcy Code. The Bankruptcy Court set aside the sale, finding that a "transfer" occurred at the foreclosure and that less than reasonably equivalent value was paid to the debtor. The bankruptcy Appellate Panel reversed, holding that reasonably equivalent value is paid as a matter of law when there is a regularly conducted foreclosure sale.

We agree that the foreclosure sale cannot be set aside, but do not base our holding on the question of reasonably equivalent value. We hold that the sale must be upheld because the transfer of the home occurred at the time of perfection of the trust deed, not upon foreclosure.

BACKGROUND

In September, 1979, Judith Madrid

purchased a home near Lake Tahoe, Nevada for $290,000. Madrid made a $125,000 down payment and executed a one-year note, secured by a first deed of trust on the residence, for the balance of $165,000. The $125,000 down payment was financed through Del Mar Commerce Company and secured by a second deed of trust on the same property. Appellee, Lawyers Title Insurance Corporation, is the substituted trustee under the second deed.

Madrid subsequently defaulted on payments due under both deeds. Pursuant to Nevada state law, Nev. Rev. State. § 107.080 and 21.130 (1979) and provisions in the second deed of trust, the trustee commenced foreclosure proceedings on the second deed. After proper notice and publication, the property was sold on January 9, 1981, at

a nonjudicial foreclosure sale to appellee, Donald Turney. Turney is in the business of buying and selling foreclosure properties. At the time of sale, approximately $176,000 was due on the first deed, and approximately $80,200 was due on the second deed. Turney, the sole bidder, paid the amount due on the second deed plus one dollar. He took the property subject to the first deed, which was also in the process of foreclosure.

On January 16, 1981, seven days after the foreclosure sale, Madrid filed a petition for reorganization under Chapter XI of the Bankruptcy Code. Madrid, as a debtor-in-possession, then brought an action in bankruptcy court to set aside the sale as a fraudulent conveyance under 11 U.S.C. § 548 (a)(2)(A) & (B)(i), which states:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year or before the date of the filing of the petition, if the debtor-

(2)(A) received less than a reasonably equivalent value in exchange for such transfer of obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

The parties agreed that Madrid met the insolvency requirement of § 548(a)(2)(B)(i). Thus, the question addressed by the courts below was whether there had been a transfer of Madrid's property interest within one year prior to filing of the Chapter XI petition, for which Madrid received less than a reasonably equivalent value.

The bankruptcy court agreed with

Madrid that the sale should be set aside as a fraudulent conveyance. The court found, without discussion, that a nonjudicial foreclosure sale constituted a transfer under 11 U.S.C. § 101 (41), albeit an involuntary transfer. The bankruptcy court then set aside the sale, concluding that the reasonably equivalent value requirement of § 548(a)(2)(A) had not been met.

The Bankruptcy Appellate Panel reversed the bankruptcy court. The Panel held that the consideration received at a noncollusive and regularly conducted nonjudicial foreclosure sale satisfied the reasonably value requirement of § 548(a)(2)(A) as a matter of law, and thus the sale could not be set aside. Although the Panel failed to address the transfer issue, it apparently assumed

that the sale constituted a transfer under § 548(a).

ANALYSIS

Since the Bankrutpcy Appellate Panel's conclusion rests on a question of law, it is subject to independent review by this court. Lama Co. v. Union Bank, 315 F. 2d 750, 752 (9th Cir. 1963). While we agree with the Panel that the sale should not be set aside under § 548(a)(2)(A), we base our reasoning on different legal principles.

We conclude that the foreclosure sale was not a transfer under § 548(a), and do not decide whether the amount paid at foreclosure was a reasonably equivalent value. For reasons that follow, we hold that the transfer of Madrid's property interest under § 548(a)(2)(A) occurred at the time the second deed of trust was perfected under

Nevada law. That transfer was carried out more than one year prior to filing of the bankruptcy petition. Thus, the transfer was not voidable as a § 548(a)(2)(A) fraudulent conveyance.

Arguments of the Parties

Madrid's § 548 petition seeks to avoid and set aside the allegedly fraudulent transfer of her equity interest in the residence. Yet before Madrid may avail herself of the relief provided under § 548(a), she must demonstrate that there has been a transfer of the residence within one year prior to filing of the bankruptcy petition. She alleges that such a transfer occurred at the nonjudicial foreclosure sale. Appellees, however, take the position that the only transfer that has taken place is the transfer at the perfection of the trust deed. They

argue that the trust deed was perfected more than a year prior to the filing of the bankruptcy petition, and is thus not subject to avoidance as a fraudulent conveyance. See In re Alsop, 145 Bank. 982 (Bank. Alaska 1981), aff'd, 22 Bankr. 1017 (D. Alaska 1982).[1/] We agree with the latter contention.

Historical Review

The modern law of fraudulent conveyance finds its origins in the 1570 English enactment of 13 Eliz., ch.5. See 4 Collier, Collier on Bankruptcy, § 67.29(1) (14th ed. 1978); 4 H. Remington, Remington on Bankruptcy, § 1638 (rev. ed. 1957). The statute was passed for the protection of creditors, and gave the creditors, inter alia, the power to avoid conveyances and transfers made with the intent and purpose to hinder, delay or defraud creditors. The American

codification of this bankruptcy law was set forth in the Bankruptcy Act of 1898. A review of § 67e of the 1898 Act demonstrates that it dealt only with conveyances made with actual intent to defraud.

The Chandler Act of 1938 replaced § 67e with § 67d. The 1938 Act expanded the law of fraudulent conveyances by creating "constructive fraudulent conveyances". This expansion permitted the setting aside of conveyances made by a debtor without fair consideration, regardless of the debtor's actual intent. 1 U.S.C. § 67d(2)(a-c). The most recent codification of the fraudulent conveyance statute is § 548(a)(2)(A) & (B)(i).

In our short historical review of the fraudulent conveyance statutes we have found no evidence that the lineal ancestors of § 548(a)(2) were to be used

to attack a secured creditor's enforcement of a lien as a constructive fraudulent conveyance. These statutes instead provide authority for the proposition that conveyances are set aside when there is actual fraud or a situation indicative fraud, such as the transfer of property for less than reasonable equivalence.

Legislative History

The statutory development of time of transfer for § 548 purposes underscores the conclusion that the enforcement of a valid lien was not intended to be covered by § 548. The first appearance of a section pinpointing time of transfer for fraudulent conveyance purposes was in § 67d of the 1938 Chandler Act. That section read:

> For the purposes of this subdivision d, a transfer shall be deemed to have been

> made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

11 U.S.C. § 67d(5)(repealed 1978). This formula for determining time of transfer remains significantly unchanged in Code § 548(d)(1). The Uniform Fraudulent Conveyance Act, progenitor of the constructive fraudulent conveyance statutes, contained no comparable provision defining time of transfer. This raises the question why Congress added such a provision.

The answer lies in the legislative history, which demonstrates that by defining transfer fraudulent conveyance

purposes in terms of time of perfection, Congress effected two purposes: (1) time of perfection served as the pivotal point in computing the reach-back period during which the bankruptcy trustee could set aside fraudulent conveyances; and (2) a secret, i.e., unperfected transfer would not escape the trustee's avoidance powers by the trustee's failure to attach it with the reach-back period, since an unperfected transfer was not deemed a transfer for § 67d purposes. See H.R. Rep. No. 1409, 75th Cong., 1st Sess. 31-34 (1937). Again, the workings of Congress display no intent to treat lien enforcement activities as constructive fraudulent conveyances.

Time of Perfection

The question of whether a particular occurrence is a transfer for bankruptcy purposes is a matter of

federal characterization. McKenzie v. Irving Trust Co., 323 U.S. 365, 369--70 (1945). State law, in turn, supplies the determination of the time and method of perfection. See id.; Evans v. Valley West Shopping Center, Inc., 567 F. 2d 358, 360 (9th Cir. 1978) (per curiam).

For purposes of § 548(a)(2), a transfer occurred when Del Mar's security interest in Madrid's residence was perfected under Nevada law. The security interest took the form of a second deed of trust, and under Nevada law perfection of a deed of trust occurs upon proper execution and recordation. Nev. Rev. Stat. § 111.353; Aladdin Heating Corp. v. Trustees of Central States, 93 Nev. 257, ___, 563 P.2d 82, 83, 86. In this case, perfection of the second deed of trust occurred more than one year prior to the filing of the bankruptcy petition.

Therefore, the transfer is not subject to attack under § 548.[2/]

Ninth Circuit Precedent

Our holding is consonant with prior Ninth Circuit decisions. See Britt v. Damson, 334 F.2d 896 (9th Cir. 1964), cert denied, 379 U.S. 966 (1965); Glessner v. Massey-Ferguson, Inc., 353 F.2d 986 (9th Cir. 1965), cert. denied, 384 U.S. 970 (1966). Britt involved a trustee's suit against the bankrupt's former wife to set aside as a fraudulent transfer a community property award made to the wife in prior divorce proceedings. We agreed with the trustee that the bankrupt previously held joint possession of the community property, and as to the part awarded to his wife, he lost possession and thus suffered a transfer for § 67d(2) purposes. Britt, however, did not involve a valid, pre-existing

lien; the only activities which constituted a transfer in Britt occurred at the time of the award in the divorce proceedings.

This distinguishing fact is highlighted by Glessner v. Massey-Ferguson, Inc., 353 F.2d 986. In Glessner the debtor signed a contract of conditional sale which was not filed by the creditor. The contract reserved title in the seller until full payment of the purchase price. Upon default, the creditor repossessed the subject property. Two months later, the debtor filed bankruptcy. We agreed that the repossession of the property was a preferential transfer under § 60a(2) of the Act. The reason the repossession constituted a transfer, however, was because the creditor had failed to file the contract for public record as

required by Arizona statute; otherwise, had the security interest been properly recorded, the transfer for § 60a(2) purposes would have occurred at the time the contract was perfected by recordation. Id. at 992. The result reached in Glessner is consistent with the result reached herein.

Fifth Circuit Precedent

Madrid's position that the non-judicial foreclosure constituted a transfer finds some support in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980). In this case the Fifth Circuit held that under Bankruptcy Act § 67d (comparable to Code § 548(a)), a transfer occurs at a foreclosure sale. In reaching its conclusion, however, the court relied on the extremely broad definition of transfer set out in 11 U.S.C.§ 1(30) of the Bankruptcy Act:

> "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

If we were to apply this definition to the case at bar, we would be ignoring the applicable, narrower definition of transfer set out in § 548(d)(1). See In re Alsop, 14 Bankr. at 986 ("Although the transaction that occurred at the foreclosure sale might, standing alone, satisfy the definition of transfer of 101(40), that definition does not stand alone in § 548."). We also agree with

the dissent in Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547, 549-50 (5th Cir. 1981) that a foreclosure sale is not a transfer by a debtor, as required under § 67(d) now § 548(a)) of the Act, but rather is an involuntary conveyance triggered by the debtor's failure to fulfill some obligation in the promissory note secured by a mortgage or deed of trust. For the above reasons, as well as the other grounds set out in our opinion, we reject the reasoning of Durrett.

Policy Considerations

In the case at bar, Madrid seeks to create a de facto redemption right to obtain real property previously sold at foreclosure proceedings. Appellees and amici argue, and we agree, that creating such a redemption right under bankruptcy laws will adversely affect commercial and real estate laws, long within the domain

of the states. Creating a federal de facto right of redemption under the bankruptcy laws is clearly contrary to nevada real property law. See, e.g., Nevada Land and Mortgage Co. v. Hidden Wells Ranch, Inc., 83 Nev. 501, ___, 435 P.2d 198, 200-201 (1967); Golden v. Tomiyasu, 79 Nev. 503, ___, 387 P.2d 989, 996-97 (1963), cert. denied, 382 U.S. 844 (1965).

We also agree with appellees and amici that creation of a de facto right of redemption would significantly chill participation at foreclosure sales, where sale prices - not subject to the usual economic competitive forces -already are frequently lower than the actual value of the property sold. See In re Alsop, 14 Bankr. at 987-88. Negative repercussions would also be likely in the lending arena, where creditors would be less

willing to lend funds on the security of a mortgage or deed of trust. No support for this drastic upset of state laws and procedures is found in the Bankruptcy Code.

Alternative Remedies Available to Debtor and Creditors

Finally, we point out that the harmful and disruptive rule which Madrid urges this court to adopt is not necessary to protect debtors or to preserve the assets of their estates for creditors. First, ample protections were afforded Madrid under Nevada's statutory system prior to the actual time of the foreclosure sale. See Nev. Rev. Stat. § 107.080, 21.130 (1979). Second, if the debtor is unable or unwilling to pursue state statutory methods to protect his or her equity during the notice period, a voluntary bankruptcy petition, then

creditors may file an involuntary petition under § 303 of the Code which would also stay the foreclosure sale. 11 U.S.C. § 303.

If bankruptcy is filed prior to foreclosure, the debtor and the unsecured creditors have a variety of protections under the Bankruptcy Code to capture any equity in the property, subject to providing adequate protection to the secured creditor. The debtor-in-possession (if a Chapter XI or XIII is filed) could repay the indebtness secured by the trust deed being foreclosed over a period of time as part of a Chapter XI or XIII plan, and thereby retain the possession and use of the property. 11 U.S.C. §§ 363, 1129, 1325. The debtor may borrow against the property to draw out the equity, and impose a lien upon the property to secure that borrowing.

11 U.S.C. § 364.

When the foreclosure sale is completed prior to bankruptcy petition filing, the debtor's options are admittedly more limited. Attacks have been made under numerous theories with varying degrees of success. See, e.g., In re Jones, 20 Bankr. 988, 990-91 (Bankr. E.D. Pa. 1982) (property subject to automatic stay of §362(a) since debtor retained some interest in property for period of time following foreclosure; therefore, sale set aside as a §549(a) post-petition transfer); In re Castillo, 3 Collier Bankr. Cas. 2d (MB) 351, 355 (Bankr. S.D.N.Y. 1980) (§ 510(c) equitable subordination attack available where secured creditor engages in inequitable conduct); In re Jordan, 2 Collier Bankr. Cas. 2d (MB) 635, 636-37

(Bankr. N.J. 1980) (preferential transfer attack made under §547). Whatever the merits of these challenges, we do not add to the arsenal of bankruptcy powers the right to avoid a non-judicial, regularly conducted foreclosure sale of real property.

Conclusion

We are reminded that the purposes of the Bankruptcy Code are either to "rehabilitate financially a distressed debtor or to assemble and liquidate his assets for distribution to creditors." H. R. Rep. No. 595, 95th Cong., 1st Sess. 10, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 5971 (footnotes omitted). To this end, Congress has been explicit about the underlying theme operational in a bankruptcy setting:

> In either kind of proceeding, the nature of bankruptcy is to sort out all of the debtor's legal relationships with others,

> and to apply the principles and rules of the bankruptcy laws to those relationships. Bankruptcy is mainly a procedural device, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy.

Id.

The legal relationship between debtor and secured creditor is a long-recognized and well-established one in the history of English and American jurisprudence. We find no Congressional intent to upset this relationship in the §548(a)(2) context presented herein. For the reasons stated above, the holding of the Bankruptcy Appellate Panel is

AFFIRMED.

FOOTNOTES

1/ Alternatively, appellees argue that even if a second transfer occurred at the time of foreclosure, when Madrid's equity in the property was transferred to the purchaser, Nevada state law dictates that the title of the purchaser at a foreclosure sale relates back to the time of the execution of the deed of trust. See, Aladdin Heating Corp. v. Trustees of Central States, 93 Nev. 257, _____ __, 563 P.2d 82, 86 (1977); Erickson Constr. Co. v. Nevada National Bank, 89 supra, 14 Bankr. at 986. As we hold that a transfer under §548(a) does not occur at time of foreclosure, we do not base our holding on the relation back doctrine.

2/ Our holding is in accord with cases decided under the preferential transfer section of the Bankruptcy Code (current Code §547; former § 60a of the Act). The principle running throughout those cases is that enforcement of a valid lien within four months of bankruptcy petition filing cannot be struck down as a preferential transfer where the lien was perfected outside the four-month reach back period. No matter what enforcement mechanism was employed, transfer for purposes of the preferential transfer section occurred at time of perfection of the lien, and not at time of enforcement. See e.g., Evans v. Valley West Shopping Center, Inc., 567 F.2d 358, 360 (9th Cir. 1978) (per curiam); Dubay v. Williams, 417 F.2d

1277, 1287-88 (9th Cir. 1969); Clements v. Snider, 409 F.2d 549, 551 (9th Cir. 1969)

In re: Madrid v. Lawyers Title Insurance Corp., No. 82-4433

FARRIS, Circuit Judge, concurring:

I agree with the majority that the non-judicial foreclosure sale of Madrid's home was not a voidable transfer, but our reasons for the result differ. Madrid seeks to set aside the sale as a fraudulent conveyance under 11 U.S.C.§548. Section 548 forbids two kinds of fraudulent transfers, those with intent to defraud and those where no intent need be shown because the inadequacy of consideration leads to an irrebutable presumption of fraud. Madrid proceeds under the second theory, contained in the following portions of §548:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date

> of the filing of the petition, if the debtor--.
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or become insolvent as a result of such transfer or obligation.

The problem with Madrid's argument is that she did not transfer the property. After she defaulted, the foreclosure proceeded without her participation or consent. I recognize that the definition of "transfer" at 11 U.S.C. §101(41) (West Supp. 1983) included "involuntary" transfers, but §548 permits the trustees to set aside a transfer "if the debtor. . . received less than a reasonably equivalent value" (emphasis added). This language contemplates that the debtor was the seller or otherwise

participated in the transaction.

The power to set aside transfers for less than "reasonably equivalent value" is an outgrowth of the prohibition against fraudulent conveyances by debtors. Congress created an irrebutable presumption of fraud in certain cases of insufficient consideration. One cannot presume fraud by the debtor in a transaction where the debtor was not a party. Section 67(d) of the prior Bankruptcy Act, virtually identical in all substantive respects to the present §548, applied only to "transfers made....by debtors". If the language of §548 does not reflect the debtor's active role as clearly as that of its predecessor, the purpose and origin of the present statute give clarity of meaning to phrases that might otherwise be ambiguous. I would therefore hold

that only transfers where the bankrupt was a participant can be set aside for absence of "reasonably equivalent value. "1/

The majority opinion would also find no voidable transfer here. It states that the transfer occurred when Madrid signed the deed of trust 15 months before filing for bankruptcy. Section 548 does not permit the trustee to set aside transfers made more than one year before filing for bankruptcy. The flaw in this approach is its assumption that there can be only one transfer. The debtor who gives a creditor a security interest in his property--a transfer for §548 purposes if the security interest is sufficiently perfected under §548(d)(1)--often retains an interest in the property, such

as possession, that can be transferred at a later date. As I understand the majority's rationale, such subsequent transfers would not be covered, even if effected with actual intent to defraud. Section 548(d)(1), relied upon by the majority, does not support the "one transfer" rule. That section addresses the problem of secret transfers by refusing to recognize transfers that are not sufficiently open to be valid against bona fide purchasers.

The majority's rationale sweeps more broadly than I believe necessary or desirable. I would hold that §548 cannot be used to set aside transfers where the debtor was not a participant. I agree that we should affirm the bankruptcy appellate panel.

FOOTNOTES

1/ The Fifth Circuit has taken a different view in Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980) and Abramson that "Durrett is simply wrong in its holding that a foreclosure is a transfer within the meaning of §67d [of the prior bankruptcy act]. Id, at 549.

In re

Judith Lynne Madrid,

Debtor.

LAWYERS TITLE INSURANCE CORP. AND DONALD TURNEY,

Appellants,

v.

JUDITH LYNN MADRID,

Appellee.

_____/

BAP No.NV-81-1106 -HVE.

Bankruptcy No.81-00038

United States Bankruptcy Appellate Panels of the Ninth Circuit

Argued Nov. 18, 1981
Decided June 22, 1982

In an action by a Chapter 11 debtor to set aside a transfer of a resident by nonjudicial foreclosure sale, the Bankruptcy Court, 10 B.R. 795, Bert M. Goldwater, J., rendered judgment in favor of debtor, and an appeal was taken. The Bankryptcy Appellate Panel, Hudges, J., held that nonjudicial foreclosure of deed

of trust would not be set aside as a fraudulent conveyance, even though purchase price was significantly less than fair market value in absence of some defect.

Reversed.

Volinn, J., dissented and file an opinion.

1. Mortgages 369(3)

Mere inadequacy of price will not upset a foreclosure sale.

2. Bankruptcy 181

Consideration received at a non-collusive, regularly conducted public sale satisfied "reasonably equivalent value" requirement of bankruptcy statute governing nonjudicial foreclosure sales even though purchase price was significantly less than fair market value. Bankr. Code, 11 U.S.C.A. §548, 548(a)(2).

3. Bankruptcy 178(1)

Nonjudicial foreclosure of deed of trust would not be set aside as a fraudulent conveyance, even though purchase price was significantly less than fair market value, in absence of some defect. Bankr. Code, 11 U.S.C.A §548.

Timothy J. Henderson, Henderson, Nelson & Moschetti, Reno, Nevada, for appellants.

Alan R. Smith, Miller & Daar, Reno, Nevada, for appellee.

Before Hughes, Volinn and Elliott, Bankruptcy Judges.

OPINION

Huges, Bankruptcy Judge:

The question presented by this appeal is whether a non-judicial foreclosure of a deed of trust can be set aside as a fraudulent conveyance under 11 U.S.C. §548 if the purchase price is

significantly less than fair market value. We hold that the consideration received at a non-collusive, regularly conducted public sale satisfies the "reasonably equivalent value" requirement of 11 U.S.C. §548(a)(2) and reverse the trial court's judgment avoiding the sale, 10 B.R. 795.

I.

Judith Madrid acquired a home near Lake Tahoe in September 1979 for $290,000, giving the seller $125,000 cash and a one-year note secured by a deed of trust for $165,000.00. The cash was raised with a note to Del Mar Commerce Co. for $142,500.00, secured by a second deed of trust. The second deed of trust was paid down by $75,300.00 in June, 1980 but no further payments were made and Del Mar requested the trustee under its deed of trust to commence non-judicial foreclosure

proceedings.

The trustee's sale took place on January 9, 1981, at which time $175,000.00 was due on the first deed of trust and $80,224.00 on the second. Donald Turney purchased at the sale for the amount of the second deed of trust. He took subject to the first deed of trust, which was in the process of foreclosure.

Madrid filed a Chapter 11 bankruptcy case on January 16, 1981 and, as debtor-in-possession, brought an action against Del Mar, Turney and the trustee under the deed of trust to set aside the trustee's sale of January 9. Two theories were advanced: 1. The sale did not comply with Nevada law; 2. The sale constituted a fraudulent conveyance pursuant to 11 U.S.C. §548(a)(2)(A). The trial court, holding that the foreclosure sale "was proper and in accordance with Nevada

statutes," found for defendants on the first theory. However, it entered judgment rescinding the foreclosure sale and cancelling the trustee's deed to Turney on the fraudulent conveyance theory.

Relying on a recent Fifth Circuit decision, the court found that Turney's bid was 64% to 67% of the property's market value at the time of sale and concluded that it was not reasonably equivalent value. The sale was held to be a voidable fraudulent conveyance. Thereafter, the court gave Turney a lien for the amount of his payment and for his attorneys fees in defending the fraudulent conveyance action. The title insurance company that had insured Turney's title was also given a lien for attorneys fees in defending the fraudulent conveyance

action.

Turney and the title company appealed the fraudulent conveyance judgment; Madrid appealed the award of a lien for attorneys fees. We reverse the judgment setting aside the sale; the judgment awarding a lien for fees is thereby rendered moot.

II.

The parties and this panel are aware of only two cases holding that a purchase at a nonjudicial sale under a deed of trust may be set side as being a fraudulent conveyance. Both cases were decided by the Fifth Circuit Court of Appeals under provisions of the Bankruptcy Act of 1898. They are Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980) and Abramson v. Lakewood Bank and Trust Co., 647 F.2d 547 (5th Cir. 1981).

In the earlier case, Durrett sought to avoid a foreclosure that took place nine days before he filed Chapter XI. The trial court held the nonjudicial sale was a transfer as that term was used in section 67d of the Act but that the consideration paid at the sale was a "fair equivalent" under section 67d(1)(e)(1) and denied relief. The circuit court reversed.

Section 67(d) of the former Act provided that every "transfer made and every obligation incurred by a debtor within a year" of bankruptcy is fraudulent as to existing creditors" if made or incurred without fair consideration by a debtor who is or will be rendered insolvent, without regard to actual intent..." Fair consideration was defined as a "fair equivalent" in a good faith exchange.

The controlling questions as seen by the Durrett court were (1) whether the trustee's sale constituted a transfer and (2) whether fair equivalent value was paid.

As to the transfer issue, the court acknowledged that the "actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness..." P.204. The transfer was more than one year before bankruptcy and therefore not vulnerable to attack under section 67d. The court held there was a second an final transfer on the day of the foreclosure sale, and this was within the one-year period.

As to the fair equivalent value issue, the Durrett Court noted that the trial court found the fair market value of the property on the date of the

foreclosure sale to be $200,000.00 and that the successful bid was $115,400.00 or 57.7 per cent of the fair market value. In reversing the trial court's determination that the amount paid was a fair equivalent, the court of appeals held as a matter of law that the amount paid was not a fair equivalent, suggesting that any amount less than 70% of fair market value would not be equivalent value.

The fair equivalent value issue was not reached in Abramson, which reserved a summary judgment on the transfer issue.

III

The case before us is governed by 11 U.S.C. §548 of the Bankruptcy Code. In its essential respects, it tracks section 67d of the former Bankruptcy Act. Thus, the questions presented for decision are (1) whether the foreclosure sale

constituted a transfer and (2) whether "reasonably equivalent value" was paid. 11 U.S.C. §548(a)(2). We find that "reasonably equivalent value" was paid and need not address the question of whether the sale constituted a transfer.

As stated earlier, the type of value that satisfied the Bankruptcy Act fraudulent conveyance provision was "fair equivalent value". In holding that a foreclosure sale for 57.7 percent of fair market value was not fair equivalent value, the Durrett court stated at page 203:

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the

property.

The only case cited in Durrett in support of that statement, Schafer v. Hammond, 456 F.2d 15 (10th Cir. 1972), was a voluntary transfer of real property by the debtor corporation to the mother of the principal stockholder of the debtor corporation. In view of our inability to find any cases other than Durrett and Abramson where a nonjudicial foreclosure sale was set aside on fraudulent conveyance grounds, we assume that the cases upon which Durrett fashioned the 70% fair market value rule were all voluntary, private transfers such as in Schafer.

However, valued it may be to hold that less than 70 percent of fair market value is not a fair equivalent for a private transfer to an insider, application of that standard to regularly

conducted public sales is questionable.

We decline to follow Durrett's 70 & fair market value rule for the reason that a regularly conducted sale, open to all bidders and all creditors, is itself a safeguard against the evils of private transfers to relatives and favorites.

The question remains whether the price obtained at a nonjudicial foreclosure sale is itself "reasonably equivalent value" of the property transferred.

IV

[1] If we consider the question of price adequacy in the context of foreclosure law we find, not surprisingly, that mere inadequacy will not upset a foreclosure sale, Golden v. Tomiyasu, 79 Nev. 503, 387 P.3d 989 (1963).

"[T]here must be in addition proof of some

element of fraud, unfairness, or oppression as accounts for and "rings about the inadequacy of price". Olter v. Sonoma County Land Title Company, 137 Cal. App.2d 633, 290 P.2d 880, which is identified as the Nevada rule. Golden v. Tomiyasu, supra 387 P.3d at 994-5. The trial court's construction of §548 would radically alter these rules. Any foreclosure sale which failed to bring 70% of the property's market value could be set aside by a bankruptcy trustee or a debtor-in-possession for a period of one year.

[2,3] The law of foreclosure should be harmonized with the law of fraudulent conveyances. Compatible results can be obtained in construing the reasonably equivalent value requirement of Code §548(a)(2) to mean the same as the consideration received at a non-collusive

and regularly conducted foreclosure sale. Thus, in the absence of defects, such foreclosure withstands avoidance as a fraudulent conveyance.

Reversed.

Volinn, Bankruptcy Judge, dissenting.

As stated by the majority, the issue is whether or not a transfer of the debtor's property, in the course of a deed of trust foreclosure sale, is the kind of transfer contemplated by 11 U.S.C. §548, the fraudulent conveyance section of the Bankruptcy Code. The majority holds that such a transfer may be a fraudulent transfer and that the reasonably equivalent value test is satisfied if the property is soled at a regularly conducted public sale and there is not collusion or irregularity.

Two decisions of the Fifth Circuit

Court of Appeals which involved similar facts and which held that the provisions of §67 of the Bankruptcy Act, the predecessor of §548, encompasses foreclosure sales, have aroused concerned comment. Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981). These cases are viewed as a new departure with a great potential for destabilizing long-established practice in the field of mortgage and deed of trust foreclosure.[1] See Abramson v. Lakewood Bank & Trust Co, at 549-50 (Clark, J., dissenting); In Re Alsop, 14 B.R. 982, (Bktcy. Alaska, 1981). Conceptually, the logic of Durrett is sound. While there may be some initial confusion as to whether the original transfer, by way of security, or the subsequent transfer at a forced sale is

the transfer which should be considered under §548, it is clear that it is the second transfer which actually divested the debtor of all interest in the property. To the extent that there may be a question as to whether or not the transfer was forced or voluntary, the Code definition of "transfer" includes involuntary transfer. 11 U.S.C. §101(40). The scope of this definition is at least as broad as its Act predecessor, 11 U.S.C. §1(30) which was in effect when Durrett was decided. See, H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), p. 314, U.S.Code Cong. & Admin. News 1978, p. 5787. Thus, §548, which states that a "trustee may avoid any transfer of an interest of the debtor" affects foreclosure sales which, albeit consented to, are in a real sense forced or involuntary.

The majority evidences great

concern with an arbitrary figure as to what may be reasonably equivalent value. It states that Durrett has in effect imposed an upset price of 70% in deed of trust or mortgage foreclosure sales. Durrett need not be read as categorically setting such a figure. The case held that a sale for 57% of the value was not for a reasonable equivalent value. In any event, I believe that the concept of "reasonably equivalent value" as a test set for 11 U.D.C. §548(a)(2) requires that the trial court examine the consideration received in such a sale in the factual context of a particular case.[2]

One cannot disregard the fact that a foreclosure sale is a forced sale and that the debtor contracted that such sale could occur in the event of default. Thus, there is a reasonable prospect that a sale under the circumstances of

foreclosure could result in a price which would be less than one made under ideal circumstances involving a seller who does not have to sell and a buyer who does not have to by. The reasonable value test of §548, as stated, is to be applied in particular factual contexts. It is thus possible, considering all the circumstances involved, that the consideration received from a forced sale pursuant to statute may be afforded a presumption that it is of reasonably equivalent value.

The majority, however, endows the consideration received at a non-collusive regularly conducted non-judicial foreclosure sale, with a conclusive or irrebuttable presumption of reasonableness. Functionally, the only way to question a fraudulent transfer under §548 is to examine the adequacy of

the consideration. If one is precluded from testing the transaction on the basis of the fraudulent transfer criterion and is deflected to criteria relating to questioning the validity of a deed of trust foreclosure, that is, collusion or irregular conduct, then the majority's logic in applying §548 as a factor in its decision is illusory.

The Bankruptcy Code is a Federal Statute. Section 548 states a standard with respect to reviewing consideration in the event of a transfer of the debtor's property. Section 548 transcends the dispute between this debtor and the secured creditor. It brings into focus the claims of the debtor's other creditors that they have been deprived of recourse to an asset by an improvident sale. The majority would hold that despite widespread differences in law and

practices relating to foreclosure, no bankruptcy court may entertain the factual issue of whether, under §548, the consideration paid was the reasonably equivalent value. By concluding that a regularly conducted sale in the absence of collusion satisfies the "reasonably equivalent value" test, the majority has excised vital language from §548 in order to create an exception to the statute where a forced sale of the debtor's property is involved. There is nothing in the Code nor its legislative history to suggest that such an exception was intended.

In conclusion, I would hold that the price paid at a regularly conducted foreclosure sale should be given, at best, a strong presumption of adequacy. It should be remembered that the burden of

proof in any event, is on the plaintiff to show that the consideration paid was inadequate. In this case the record shows that the Bankruptcy Judge heard the facts and gave the matter a good deal of thought.[3] He concluded that a price of about 67% of the fair market value was not a reasonably equivalent value. This is a finding of fact which may be overturned only if it is clearly erroneous. Bankr. Rule 810. I am satisfied that his conclusion was reasonable and supported by the record. I would affirm.

FOOTNOTES

[1]This is a policy issue, essentially. It may be that the problem should be dealt with legislatively. Insofar as it should be a matter of judicial concern, it is obvious that those who purchase at foreclosure sales do so to make a profit. From a certain point of view, the issue, insofar as it involves adequacy of price, gives consideration as to whether creditors of the debtor have suffered a loss by virtue of the purchaser getting too great a bargain. If this is found to be so, the purchases loses what the court found to be an excessive profit. He is still entitled at least to a lien for what he invested. 11 U.S.C. §548(c).

[2]The primary goal of the seller at a foreclosure sale is satisfaction of a debt. This goal is different than that of a seller trying for the highest possible price. Given this difference in motivation, and the same market circumstances, results could differ substantially. It is this difference which is the area of inquiry encompassed by the term "reasonably equivalent value".

[3]In his Opinion and Decision the trial court, after some analysis concluded:

> "Defendant Turney paid 64% to 67% of the market value of a very unique piece of residential property. At the time of the sale he was prepared to bid approximately $6,000.00

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more. Immediately after the sale he insured the property for $325,000.00 as fire value...a purchase price of $256,000.00 in this case is not the reasonably equivalent value of a market appraisal of $380,000.00 to $400,000.00."

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In re

JUDITH LYNNE MADRID,

Debtor.

Bankruptcy No.81-00038
Adversary No. 81-0003

_____/

JUDITH LYNN MADRID,

Plaintiff,

vs.

DEL MAR COMMERCE COMPANY, a California corporation; LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation, DONALD TURNEY, an individual; and DOES I through V, inclusive,

Defendants.

_____/

United States Bankruptcy Court
D. Nevada

May 1, 1981

In an action by a Chapter 11 debtor to set aside a transfer of a residence by nonjudicial foreclosure sale, the Bankruptcy Court, Bert M. Goldwater, J., held that price of $256,000.00, paid by

person whose business was to buy at foreclosures and resell, was not reasonably equivalent value of market appraisal of $380,000.00 to $400,000.00, and, accordingly, nonjudicial foreclosure sale would be rescinded by the bankruptcy court.

Sale rescinded.

1. Mortgages 352

That debtor appeared at office of trustee on deed of trust to request that certain order be sent to her at post office box number 6647 was not sufficient to put trustee on notice that debtor was using post office box number 6647 rather than box number 5926. N.R.S. 21.130, 107.080.

2. Mortgages 352

As between debtor and trustee on deed of trust, it was debtor's responsibility to request that post office

transfer her mail, and trustee was under no duty to search for debtor when notices were returned unclaimed, but where it was established that debtor actually knew about foreclosure sale, issue became moot. N.R.S. 21.130, 107,080.

3. Bankruptcy 165(3.2)

Nonjudicial foreclosure sale is involuntary transfer, but falls within bankruptcy code definition of "transfer". Bankr. Code, 11 U.S.C.A. §101(40).

See publication Words and Phrases for other judicial constructions and definitions.

4. Mortgages 369(3)

Price of $256,600.00, paid by person whose business was to buy at foreclosures and resell, was not reasonably equivalent value of market appraisal of $380,000.00 to $400,000.00, and, accordingly, nonjudicial foreclosure

sale was rescinded by the bankruptcy court. Bankr. Code, 11 U.S.C.A. §548(a)(2), (a)(2)(A), (a)(2)(B)(i), 1101, et seq.; Bankr. Act, §67(d)(2), 11 U.S.C.A. §107(d)(2).

Alan R. Smith, Miller & Daar, Reno, Nevada, for Plaintiff.

Timothy J. Henderson, Henderson, Nelson & Moschetti, Reno, Nevada, for Del Mar Commerce Co. & Lawyers Title Insurance Corp.

Roger A. Bergmann, Reno, Nev., for Donald Turney.

JUDGMENT AND NOTICE OF HEARING ON LIENS

Bert M. Goldwater, Bankruptcy Judge.

The Court having rendered its Opinion and Decision which states findings

of fact and conclusions of law, and good cause appearing, Judgment is hereby entered that:

1. The foreclosure sale of plaintiff's residence at 1528 Debra Lane, Incline Village, by defendant Lawyers Title to defendant Don Turney is hereby rescinded and the trustee's deed recorded as Document No. 717630 on January 13, 1981 with County Recorded of Washoe County, Nevada, is cancelled.

2. A hearing to establish the lien rights of the holder of the second deed of trust and defendants for principal, interest, costs, taxes, insurance premiums, and attorney fees is hereby set for Wednesday, May 6, 1981, at 10:00 a.m.

OPINION AND DECISION

This is an action by a Chapter 11 debtor to set aside a transfer of her

residence by a nonjudicial foreclosure sale upon the grounds that (1) she did not receive notices of default and sale pursuant to N.R.S. 107.-080 and 21.130, and (2) the sale is a voidable transfer under 11 U.S.C. §548(a)(2)(A) and (B)(i).

In late summer 1979, debtor, Judith Lynne Madrid (Judith), and her husband, Al Madrid (Al), decided to purchase a family residence as part of a property settlement agreement in which Al was to quitclaim his interest in the residence to Judith but continue to make the payments on the residence.[1] In September 1979, Judith and Al purchased a home at 1528 Debra Lane, Incline Village, Nevada, from George G. Sayre/Pulver Co. (Sayre/Pulver) for $290,000.00. Sayre/Pulver asked $125,000.00 down and was willing to accept a one-year note secured by a first deed of trust for the

balance of $165,000.00. The Madrids arranged through Del Mar Commence Company of Oakland, California (Del Mar), to borrow $142,500.00 for the cash down payment from one Laurel Blum to be secured by a second deed of trust.[2] Del Mar was trustee of record in the second deed of trust until August 12, 1980, when Lawyers Title Insurance Corporation of Reno, Nevada (Lawyers), was substituted as trustee.[3] The address given in the deed of trust for the trustor was 1528 Debra Lane.[4]

On September 4, 1979, Al quitclaimed his interest in the home to Judith. Escrow closed October 1979.

In January 1980, Judith rented Post Office Box No. 5926 at the Incline Village Post Office for one year and received the key. Soon thereafter, Al took the key away from her. In March, 1980, Judith

rented Post Office Box No. 6647, but did not advise the Incline Village Post Office to transfer her mail from Box No. 5926 to Box No. 6647. In October 1980, debtor became concerned she was not receiving her mail at Box 6647 and obtained another key to Box No. 5926. She kept the new key to Box No. 5926 until Mid-November when she learned that a criminal investigation against her husband was pending, and, out of fright, threw away the key.[5]

Debtor contends that she gave Del Mar her 6647 Post Office Box Number during a telephone call on November 19, 1980. Although Del Mar's witness testified that Del Mar has no record of such a telephone call, the Court finds that Del Mar was of November 19, 1980 that debtor wished to receive her mail at Post Office Box No. 6647.

There were frequent defaults on

the payments due under the first deed of trust, but the first few defaults were cured.[6] Default on the payment due under second deed of trust was made within a few months after the close of escrow. On June 19, 1980, debtor made a $75,300.00 principal payment on the second deed of trust, and signed a Modification and Extension Agreement which provided for a three-month extension for payment of principal to January 31, 1981, and an increased monthly interest payment.[7] After that payment, there was a principal balance of $67,200.00 with interest of $1,416.45 due on July 1, and interest of $840.00 per month due on the first day of each month thereafter. When debtor failed to pay the installments of interest due July 1, August 1, and September 1, the holder of the second deed requested Lawyers begin foreclosure proceedings.

Notice of default and election to sell the property under the second deed of trust was recorded September 10, 1980. A copy of the notice was mailed on that date, certified mail, to debtor at 1528 Debra Lane. That notice was returned unclaimed with the number "5926" written on the envelope. On October 6, 1980, another copy was sent certified mail to debtor at Post Office Box No. 5926. Notices for receipt of certified mail were placed in Box No. 5926 by the Post Office at Incline Village on October 7 and 16. The mail was not claimed and was returned to sender October 28, 1980.

On December 16, 1980, the notice of time and place of the sale scheduled for January 9, 1981 was mailed to debtor, certified mail, Debra Lane and at Post Office Box No. 5926. Both envelopes were returned unclaimed.

The sale was held on January 9, 1981. At the time of the sale there was approximately $175,000.00 due on the first deed of trust and $80,224.39 due on th second deed of trust. Defendant Turney, the only bidder at the sale, bid the amount due on the second deed of trust plus one dollar. He testified that he went to the sale prepared to bid as high as $86,500.00.[8] With expenses on the day of the sale, Turney planned to pay approximately $256,000.00 for the property. He immediately insured the improvements for fire in the amount of $325,000.00.

In the spring of 1980, debtor listed her property with a real estate broker for sale at $395,000.00. Extensive exposure was given by the realtor due to the uniqueness of the property. The "nearly" new 2700 square

foot residence is situated on a private road on a half-acre lot a short distance from a 250 foot private Lake Tahoe beach and pier shared by the Debra Lane homeowners.[9] The house was shown approximately twelve times, but no offers were received. Debtor terminated the realtor's listing in August 1980, but continued to try to sell the house or obtain financing until after the sale on January 9, 1980. The evidence showed that debtor was negotiating at the time of the sale with a potential buyer who had not knowledge of the sale. The buyer made a $342,000.00 for the property on January 10, 1981.

[1] In connection with her own efforts to sell or finance, debtor requested a title report on another piece of real property from Lawyers in early November. The debtor appeared at Lawyers

Reno office to request the order and the order was sent to her at Post Office Box No. 6647. That incident was not sufficient to put Lawyers on notice that debtor was using Post Office Box 6647 rather than Box No. 5926.

Also in connection with her efforts, debtor telephoned Jay Graves (of Del Mar) on December 24, 1980 to learn the amount due on the second deed of trust and whether or not the holder of the second would allow assumption of the debt.[10] The secretary who talked to debtor wrote a message on December 24, as follows:

> Judith Madrid called. She wants extension (sic) of 1-9-81 sale because she thinks she has buyer. She is at Nevada house. Debtor filed under Chapter 11 on January 16, 1981.

Her schedules show her insolvent financial condition. She owes in excess of

$25,000.00 mostly for improvements on the residence,[11] and is insolvent but for the potential equity in her residence. The equity, had the house been sold for its appraised value on January 9, 1981, would have been between $125,000.00 and $145,000.00. Defendant Turney's appraiser put the fair market value of the house at $330,000.00[12] Established Incline real estate brokers and plaintiff's appraiser placed the market value between $380,000.00 and $400,000.00, which the Court finds to be the fair market value on January 9, 1981.

Debtor contends she had no notices of the default or sale. Alternatively, debtor contends that even if she had constructive notice she did not have property notice because she should have been noticed at her last known address, Post Office Box No. 6647.

Debtor also contends that the transfer of her residence to defendant Turney for approximately $256,000.00 was a fraudulent transfer under 11 U.S.C. §548(a)(2)(A) and (B)(i) because the sale price was less than a reasonably equivalent value.

I.

N.R.S. 107.080 provides in part:

3. That 15 or 35 day period provided in paragraph (a) of subsection 2 commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by certified mail with postage prepaid to the grantor or to his successor in interest at the address of the grantor or his successor in interest

if known, otherwise to the address of the trust property. Such notice of default and election to sell must describe the deficiency in performance of payment and may contain a notice of intent to declare the entire unpaid balance due and payable if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if the deficinecy in performance or payment is made good and any costs, fees and expenses incident to the preparation or recordation of such notice and incident to the making of the deficiency in performance or payment are paid within the time specified in subsection 2.

4. The Trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, after expiration of the 3-month period following the recording of

notice of breach and election to sell, and prior to the making of such sale, give notice to the time and place thereof in the manner and for a time not less than that required by law for the sale or sales of real property upon execution. The sale itself may be made at the office of the trustee, if the notice so provided, whether the property so conveyed in trust is located within the same county as the office of the trustee or not.

N.R.S. 21.130 provides in part:

3. Real Property. In care of real property, by personal service upon each judgment debtor or by registered mail to the last known address of each judgment debtor and by posting a similar notice particularly describing the property, for 20 days successively, in 3 public places of the township or city where the property is situated and also where the property is

to be sold; and also by publishing a copy of the notice three times, once a week, for 3 successive weeks, in a newspaper, if there be one in the county. The cost of publication shall in no case exceed the rate for legal advertising as provided in NRS 238.070. In any case where the paper authorized by this section to publish such notice of sale neglects or refuses from any cause to make such publication, then the posting of notices as provided in this section shall be deemed sufficient notice. Notices of the sale of property on execution upon a judgment for any sum less than $500.00, exclusive of costs, shall be given only by posting in 3 public places in the county, 1 of which shall be posted at the courthouse. (Emphasis added).

As to N.R.S. 108.080 and 21.130, the issue is whether or not the statutory notices were adequate in light of the fact

that they were mailed to Post Office Box No. 5926 and returned to sender unclaimed.

[2] Debtor had complete access to Post Office Box No. 5926 when notice of the receipt of certified mail containing the notice of default and election to sell was placed in Box No. 5926 on October 16, 1980. Additionally, it was the debtor's responsibility to request that the Post Office transfer her mail from 5926 to 6647.

Lawyers was under no duty to search for debtor when the notices were returned unclaimed. Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971). Debtor's action in throwing away the key to the box is no defense.

Although Del Mar knew debtor's last known address and failed to advise Lawyers, the issue becomes moot because it appears debtor had notice. Debtor's call

to Del Mar on December 24, 1980 establishes the fact the debtor actually knew about the foreclosure sale. Hankins v. Adm. of Veterans Affairs, 92 Nev. 578, 555 P.2d 483 (1976).

Foreclosure was proper and in accordance with Nevada statutes.

II.

11 U.S.C. §548(a)(2)(A) and (B)(i) provide:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor-
>
> * * * * *
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred; or became insolvent as a result of such transfer or obligation;

With respect to Section 548(2)(A), the issue is whether or not the price paid was a reasonably equivalent value.

Section 548(a)(2) is derived in part from §67(d)(2) of the former Bankruptcy Act which permitted a trustee in bankruptcy to avoid transfers by the debtor in fraud of his creditors. Bankr. Act, Section 67(d)(2), H.R. Rep. No. 95 595, 95th Cong., 1st Sess. 375 (1977), U.S. Code Cong. & Admin. News 1978, p.5787. Under §67(d)(2) fair consideration had to be given for a transfer and fair consideration included the requirement of good faith as well as fair equivalent value. Cohen v. Sutherland, 257 F.2d 737 (2d Cir. 1958). Under present Section 548(a)(2)(A) and (B)(i), if the two conditions of less than reasonably equivalent value and insolvency are present, there is a

conclusive presumption of fraud, any intent to the contrary notwithstanding. 4 Collier on Bankruptcy 543-48 (15th ed. 1980).[13] Fair consideration under former Section 67(d)(2), but for its good faith requirement, corresponds to reasonably equivalent value under Section 548(a)(2)(A).[14]

[3] Cases under Section 67(d)(2) hold that fair consideration must be determined by the facts and circumstances of each case. In In re Ferris, 415 F. Supp. 33, 40 (W.D. Okl. 1976), the Court held that the consideration was not fair in view of the facts that the mortgage had been reduced, the bankrupts had spent considerable sums which enhanced the value of the property, and the cost of replacement was estimated to be much more than the original building costs.

A case upon almost identical

facts with the case at bar is Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). In Durrett there was only one bidder at the deed of trust foreclosure sale and he bid $115,400.00 (the exact amount necessary to liquidate the indebtedness secured by the deed of trust) for property valued at $200,000.00. The District Court for the Northern District of Texas (460 F.Supp. 52) held that the payment of 57.7% of the value of the property was fair consideration. The Fifth Circuit reversed stating:

> We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under Section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the property.

In making its decision in Durrett, the

Court relied heavily on the fact that the sale deprived the bankruptcy estate of an equity in the property of $84.600.00.

[4] The facts in this case differ only in that the defendant Turney paid 64% to 67% of the market value of the property rather than 57.7%. The equity which the bankruptcy estate and creditors have been deprived of in this case ranges from $125,000.00 to $145,000.00. It is apparent that the Courts have established a firm 70% guideline because the greater the market value of a piece of property the more equity that can be cut off by the variation of a few percentage points.

Defendant Turney paid 64% to 67% of the market value of a very unique piece of residential property. At the time of the sale he was prepared to bid approximately $6,000.00 more. Immediately after the sale he insured the property for

$325,000.00 as fire value. The debtor enhanced the value of the property with certain improvements and paid $75,300.00 in principal on the second deed of trust. A buyer on January 10, 1981, was willing to pay approximately $85,000.00 more than was paid at the foreclosure sale.

A purchase price of $256,000.00 in this case is not the reasonably equivalent value of the market appraisal of $380,000.00 to $400,000.00.

FOOTNOTES

[1] The testimony shows that the parties had been separated since 1977, and were buying a house in order to settle certain of their affairs before filing for divorce.

[2] The disposition of the balance of $17,500.00 remaining after the cash down payment of $125,000.00 is unknown.

[3] Debtor was not given notice of the substitution of trustees, but the lack of notice is not relevant as will later appear.

[4] Although 1528 Debra Lane was given as the trustor's address, there is no street delivery in Incline Village.

[5] One part of the criminal investigation appears to have resulted from Al's writing numerous bad checks.

[6] Notices of default were served May 1, 1980, August 28, 1980, and October 23, 1980. At the time of the sale under the second deed of trust, Sayre/Pulver was also proceeding with foreclosure.

[7] Al was to make all of the payments on the promissory notes secured by the first and second deeds of trust, but failed to make any such payments.

[8] Turney's business is to buy at foreclosures and resell. Turney was a bona fide purchaser.

[9] Defendant Turney's expert witness testified that she did not cost approach analysis because land with access to a

private beach can no longer be bound at Lake Tahoe.

[10] Mr. Graves is a lawyer who represented the holder of the second deed of trust.

[11] After she moved into the house debtor had the yard landscaped, added shutter, a fence, and a ballet bar which improvements definitely increased the value of the property.

[12] The appraisal does not consider a cost approach analysis.

[13] Although a nonjudicial foreclosure sale is an involuntary transfer, it clearly falls within the definition of transfer in 11 U.S.C. §101(40). See also Cowen v. Guidry, 274 F.Supp. 22 (E.D. La. 1967).

[14] No cases have been found which define reasonably equivalent value under 11 U.S.C. §548(a)(2)(A).